

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Robert Schmidt dba RSISP
Licensee of Station WQMN655,
Ponce, Puerto Rico
File No.: EB-FIELDSCR-12-00001225
NAL/Acct. No.: 2013326800002
FRN: 0020106373

FORFEITURE ORDER

Adopted: October 23, 2013

Released: October 23, 2013

By the Regional Director, South Central Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Forfeiture Order (Order), we issue a monetary forfeiture in the amount of three thousand dollars (\$3,000) to Robert Schmidt dba RSISP (RSISP), licensee of Station WQMN655, in Ponce, Puerto Rico, for willfully and repeatedly violating Section 301 of the Communications Act of 1934, as amended (Act), and Sections 1.903 and 90.1307 of the Commission's rules (Rules). The noted violations involved RSISP's failure to register two communications sites prior to putting them into operation.

II. BACKGROUND

2. On February 12, 2013, the Enforcement Bureau's San Juan Office (San Juan Office) issued a Notice of Apparent Liability for Forfeiture (NAL) for twelve thousand dollars (\$12,000) to RSISP for operating transmitters in the 3650-3700 MHz band at two sites without Commission authorization. As reflected in the NAL, although the Rules and terms of RSISP's license require registration of all fixed or base stations prior to operation, RSISP operated radio transmitters in the 3650-3700 MHz band from sites in Juana Diaz and Ponce, Puerto Rico, on March 16 and 21, 2012. The Juana Diaz and Ponce sites were not posted or registered in the FCC's Universal Licensing System (ULS) for Call Sign WQMN655 until April 26, 2012. In response to the NAL, RSISP requests cancellation or reduction of the proposed forfeiture because: (1) it erroneously thought it had registered its sites prior to March 2012; (2) it thought it had received permission to operate temporarily without authorization while it transitioned its customers to another system; and (3) it cannot afford to pay the \$12,000 forfeiture.

1 47 U.S.C. § 301; 47 C.F.R. §§ 1.903, 90.1307.

2 Robert Schmidt dba RSISP, Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 1082 (Enf. Bur. 2013) (NAL). A comprehensive recitation of the facts and history of this case can be found in the NAL and is incorporated herein by reference.

3 Id. at 1082-83, paras. 2-5.

4 Id. at 1083, para. 6.

5 Letter from Robert Schmidt to the San Juan Office, South Central Region, Enforcement Bureau at 1-2 (filed March 20, 2013, in EB-FIELDSCR-12-00001225) (NAL Response).

III. DISCUSSION

3. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,⁶ Section 1.80 of the Rules,⁷ and the *Forfeiture Policy Statement*.⁸ In examining RSISP's response, Section 503(b)(2)(E) of the Act requires that the Commission take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.⁹

4. We affirm the *NAL*'s finding that RSISP violated Section 301 of the Act and Sections 1.903 and 90.1307 of the Rules.¹⁰ Section 301 of the Act states that no person shall use or operate any apparatus for the transmission of energy or communications or signals by radio except under and in accordance with a license.¹¹ Section 1.903 of the Rules states that a "[s]tation in the Wireless Radio Service must be used and operated only in accordance with the rules applicable to their particular service as set forth in this title and with a valid authorization granted by the Commission"; and that "[t]he holding of an authorization does not create any rights beyond the terms, conditions and period specified in the authorization."¹² Section 90.1307 of the Rules states: "[t]he 3650-3700 MHz band is licensed on the basis of non-exclusive nationwide licenses," and that "[a] licensee cannot operate a fixed or base station before registering it under its license"¹³ The license for Station WQMN655 also clearly states that it "does not authorize any operation of a fixed or base station that is not posted by the FCC as a registered fixed or base station" in the ULS.¹⁴

5. It is undisputed that RSISP operated radio transmitters in the 3650-3700 MHz band from sites in Juana Diaz and Ponce, Puerto Rico, on March 16 and March 21, 2012. It is also undisputed that the Juana Diaz and Ponce sites were not posted or registered in the ULS for Call Sign WQMN655 until April 26, 2012. In its response to the *NAL*, RSISP attempts to justify the violations based on its erroneous understanding about the status of the registration and its ability to operate temporarily, but such explanations do not serve to justify or mitigate the violations. Although RSISP submitted amendments to register its sites prior to March 15, 2012, a licensee cannot operate in conformity with its amendment applications based on the assumption that the applications will later be granted.¹⁵ Moreover, its erroneous beliefs that it had registered its sites or that it could operate on an unlicensed basis until it transitioned its customers to other systems¹⁶ are irrelevant to whether it willfully operated on an unlicensed basis. Section 312(f)(1) of the Act defines "willful" as the "conscious and deliberate commission or omission of [any] act, irrespective of

⁶ 47 U.S.C. § 503(b).

⁷ 47 C.F.R. § 1.80.

⁸ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997), *recons. denied*, 15 FCC Rcd 303 (1999) (*Forfeiture Policy Statement*).

⁹ 47 U.S.C. § 503(b)(2)(E).

¹⁰ See *NAL*, *supra* note 2.

¹¹ 47 U.S.C. § 301.

¹² 47 C.F.R. § 1.903(a) & (b).

¹³ 47 C.F.R. § 90.1307.

¹⁴ See Universal Licensing System, License Call Sign WQMN655.

¹⁵ See 47 U.S.C. § 301. See also *Ace of Hearts Disc Jockey Service, Inc.*, Memorandum Opinion and Order, 28 FCC Rcd 1095 (Enf. Bur. 2013).

¹⁶ We note that the written warning provided to RSISP stated "**ANY OPERATIONS IN THE 3650-3700 MHz BAND MUST CEASE UNTIL YOUR REGISTRATIONS ARE POSTED BY THE FCC.**" *RSISP*, Warning of Unlicensed Operations (Mar. 19, 2012) (on file in EB-FIELDSCR-12-00001225) (emphasis in original). The agent also stated in an e-mail on March 21, 2012, that "[a]ll non registered sites should be taken off the air immediately." See e-mail from Reuben Jusino, Resident Agent, San Juan Office, South Central Region, Enforcement Bureau, to Robert Schmidt (Mar. 21, 2012, 5:14 p.m.) (on file in EB-FIELDSCR-12-00001225).

any intent to violate” the law.¹⁷ RSISP clearly intended to operate its systems from the Juana Diaz and Ponce sites on March 16 and March 21, 2012.¹⁸ Thus, its violations were willful and repeated. Therefore, based on the evidence before us, we conclude that RSISP willfully and repeatedly violated Section 301 of the Act and Sections 1.903 and 90.1307 of the Rules by operating transmitters in the 3650-3700 MHz band at two sites without Commission authorization.

6. RSISP, in its response to the *NAL*, also asserts that it is unable to pay the \$12,000 forfeiture because of its financial circumstances. With regard to an individual’s or entity’s inability to pay claim, the Commission has determined that, in general, gross revenues are the best indicator of an ability to pay a forfeiture.¹⁹ Based on the financial documents provided by RSISP, we find sufficient basis to reduce the forfeiture to \$3,000.²⁰ However, we caution RSISP that a party’s inability to pay is only one factor in our forfeiture calculation analysis, and is not dispositive.²¹ We have previously rejected inability to pay claims in cases of repeated or otherwise egregious violations.²² Therefore, future violations of this kind may result in significantly higher forfeitures that may not be reduced due to RSISP’s financial circumstances.

IV. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.204, 0.311, 0.314, and 1.80(f)(4) of the Commission’s rules, Robert Schmidt dba RSISP **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of three thousand dollars (\$3,000) for violations of Section 301 of the Act and Sections 1.903 and 90.1307 of the Commission’s rules.²³

¹⁷ 47 U.S.C. § 312(f)(1).

¹⁸ RSISP also argues that a reduction of the forfeiture is justified because (it asserts) it was working to stop operations on March 21, 2012, and succeeded in doing so at 1:35 a.m. on March 22, 2013. *See NAL Response* at 1-2. We disagree. The fact that RSISP ceased operations in the early morning hours of March 22, 2012, does not negate the fact that it operated on March 21, 2012, in violation of the Rules.

¹⁹ *See Local Long Distance, Inc.*, Forfeiture Order, 16 FCC Rcd 24385 (2000) (forfeiture not deemed excessive where it represented approximately 7.9 percent of the violator’s gross revenues); *Hoosier Broadcasting Corporation*, Forfeiture Order, 15 FCC Rcd 8640 (2002) (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator’s gross revenues).

²⁰ This forfeiture amount falls within the percentage range that the Commission has previously found acceptable. *See supra* note 19. In its response to the *NAL* (at 1-2), RSISP states that a reduced forfeiture should be considered because its failed efforts to register its sites prior to March 16, 2012, nevertheless demonstrated good faith attempts to comply with the Rules. Because we are already reducing the forfeiture based on RSISP’s inability to pay, and the reduction provided in this case is well beyond any reduction it would otherwise receive for its good faith argument, we need not address this claim. *See, e.g., Entertainment Media Trust*, Forfeiture Order, 28 FCC Rcd 2181, 2184 & n.22 (Enf. Bur. 2013).

²¹ *See* 47 U.S.C. § 503(b)(2)(E) (requiring the Commission to take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require).

²² *See, e.g., Whisler Fleurinor*, Forfeiture Order, 28 FCC Rcd 1087 (Enf. Bur. 2013) (affirming \$25,000 forfeiture and rejecting inability to pay claim because violator was previously afforded a reduction based on inability to pay, but later committed the same violation). *Accord Kevin W. Bondy*, Forfeiture Order, 26 FCC Rcd 7840 (Enf. Bur. 2011) (holding that violator’s repeated acts of malicious and intentional interference outweigh evidence concerning his ability to pay claim), *aff’d*, Memorandum Opinion and Order, 28 FCC Rcd 1170 (Enf. Bur. 2013) (further request for reconsideration pending); *Hodson Broadcasting Corp.*, Forfeiture Order, 24 FCC Rcd 13699 (Enf. Bur. 2009) (holding that permittee’s continued unauthorized operation outweighed its inability to pay claim).

²³ 47 U.S.C. §§ 301, 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80(f)(4), 1.903, 90.1307.

8. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within thirty (30) calendar days after the release date of this Forfeiture Order.²⁴ If the forfeiture is not paid within the period specified, the case may be referred to the U.S. Department of Justice for enforcement of the forfeiture pursuant to Section 504(a) of the Act.²⁵ Robert Schmidt dba RSISP shall send electronic notification of payment to SCR-Response@fcc.gov on the date said payment is made. The payment must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account Number and FRN referenced above. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.²⁶ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

8. Any request for making full payment over time under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²⁷ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

9. **IT IS FURTHER ORDERED** that a copy of this Order shall be sent by both First Class and Certified Mail, Return Receipt Requested, to Robert Schmidt dba RSISP at his address of record.

FEDERAL COMMUNICATIONS COMMISSION

Dennis P. Carlton
Regional Director, South Central Region
Enforcement Bureau

²⁴ 47 C.F.R. § 1.80.

²⁵ 47 U.S.C. § 504(a).

²⁶ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

²⁷ See 47 C.F.R. § 1.1914.